Supreme Court, U.S.
FILED

No. 93-1249 JAN 31 1994

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

JIM PYLE,
Petitioner,

v.

STATE OF ARKANSAS,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Arkansas

---

PETITION FOR WRIT OF CERTIORARI

BOBBY MCDANIEL
MCDANIEL & WELLS, P.A.
400 South Main Street
Jonesboro, Arkansas 72401
(501) 933-5950
Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

I

Whether a police officer's affidavit to obtain a search warrant, structured in such a way as to omit material facts that would vitiate probable cause, along with material, knowing and reckless false statements, violates the standard set forth in *Franks v. Delaware* and *United States v. Leon,* and requires suppression of the evidence seized pursuant to the warrant.

II

Whether this court should take this case to resolve the split in the federal circuit courts of appeal and state courts as to whether a Defendant that takes the witness stand in his own defense and absolutely denies any participation in the charged crime can be confronted by the State in rebuttal with proof of other unrelated bad acts for the purpose of showing knowledge or intent to commit the crime charged.

III

Whether the mere existence of cash money seized at Defendant's residence, not connected by any evidence to any drug transaction, is relevant for the jury to consider as evidence of defendant's intent to distribute a controlled substance, i.e., is cash money, in and of itself, without more, evidence of criminal conduct.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT	2
A. Facts Leading Up To The Application For Search Warrant	4
B. Affidavit, Probable Cause Hearing And Execution Of Warrant	5
C. Suppression Hearing—How The Federal Question Was Presented	6
REASON FOR GRANTING THE WRIT	10
I. WHETHER A POLICE OFFICER'S AFFIDAVIT TO OBTAIN A SEARCH WARRANT, STRUCTURED IN SUCH A WAY AS TO OMIT MATERIAL FACTS THAT WOULD VITIATE PROBABLE CAUSE, ALONG WITH MATERIAL, KNOWING AND RECKLESS FALSE STATEMENTS, VIOLATED THE STANDARD SET FORTH IN *FRANKS v. DELAWARE* AND *UNITED STATES v. LEON*, AND REQUIRES SUPPRESSION OF THE EVIDENCE SEIZED PURSUANT TO THE WARRANT	11
A. *Franks* Should Be Extended To Include Omissions	12
B. The Decision Of The Arkansas Supreme Court Is Erroneous	13

TABLE OF CONTENTS—Continued

Page

II. WHETHER THIS COURT SHOULD TAKE THIS CASE TO RESOLVE THE SPLIT IN THE FEDERAL CIRCUIT COURTS OF APPEAL AND STATE COURTS AS TO WHETHER A DEFENDANT THAT TAKES THE WITNESS STAND IN HIS OWN DEFENSE AND ABSOLUTELY DENIES ANY PARTICIPATION IN THE CHARGED CRIME CAN BE CONFRONTED BY THE STATE IN REBUTTAL WITH PROOF OF OTHER UNRELATED BAD ACTS FOR THE PURPOSE OF SHOWING KNOWLEDGE OR INTENT TO COMMIT THE CRIME CHARGED 15

A. This Question Presented Is Important 16

B. A Split Of Authority Exists In The Circuit Courts Of Appeal 17

III. WHETHER THE MERE EXISTENCE OF CASH MONEY SEIZED AT JIM PYLE'S RESIDENCE, NOT CONNECTED BY ANY EVIDENCE TO ANY DRUG TRANSACTION, IS RELEVANT FOR THE JURY TO CONSIDER AS EVIDENCE OF DEFENDANT'S INTENT TO DISTRIBUTE A CONTROLLED SUBSTANCE, I.E., IS CASH MONEY, IN AND OF ITSELF, WITHOUT MORE, EVIDENCE OF CRIMINAL CONDUCT 19

CONCLUSION 20

APPENDIX

Opinion of Arkansas Supreme Court 1a

Denial of Petition for Rehearing 16a

TABLE OF AUTHORITIES

Cases:

Page

Elkins v. United States, 364 U.S. 206, 80 S.Ct. 1437 (1960) 15

Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978) 2, 6, 10, 11, 14

United States v. Brett, 872 F.2d 1365 (8th Cir. 1989) 19

United States v. Colon, 880 F.2d 650 (2d Cir. 1989) 18

United States v. Gibbs, 904 F.2d 52 (D.C. Cir. 1990) 20

United States v. Hernandez, 975 F.2d 1035 (4th Cir. 1992) 18

United States v. Jacobs, 986 F.2d 123 (8th Cir. 1993) 13

United States v. Jenkins, 7 F.3d 803 (8th Cir. 1993) 18

United States v. LaGuardia, 774 F.2d 317 (8th Cir. 1985) 19

United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed 677 (1984) 2, 12, 14

United States v. Mazzanti, 888 F.2d 1165 (7th Cir. 1989), *cert. denied*, 495 U.S. 930 (1990) 18

United States v. Newton, 891 F.2d 944 (1st Cir. 1989) 19

United States v. Ortiz, 857 F.2d 900 (2d Cir. 1988), *cert. denied*, 489 U.S. 1070 (1989) 16, 18

United States v. Palmer, 990 F.2d 490 (9th Cir. 1993) 18

United States v. Reivich, 793 F.2d 957 (8th Cir. 1986) 13

United States v. Russo, 717 F.2d 545 (11th Cir. 1983) 18

United States v. Silva, 580 F.2d 144 (5th Cir. 1978) 16, 18

United States v. Thompson, 925 F.2d 234 (8th Cir. 1991) 20

TABLE OF AUTHORITIES—Continued

Constitutional Provisions, Statute and Rule:	Page
U.S. Constitution, Fourth Amendment	2
28 U.S.C. § 1257 (3)	2
Fed. R. Evid. 404 (b)	17
Ark. R. Evid. 404 (b)	15, 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. ————

JIM PYLE,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Arkansas

---

PETITION FOR WRIT OF CERTIORARI

Jim Pyle respectfully petitions for a writ of certiorari to review the judgment of the Arkansas Supreme Court in this case.

OPINIONS BELOW

The opinion of the Arkansas Supreme Court (App., *infra,* 1a-15a) is reported at 314 Ark. 165, 862 S.W.2d 823 (1993). The order denying Jim Pyle's petition for rehearing (App., *infra,* 16a) is not reported. There was no written opinion from the trial court.

JURISDICTION

The Arkansas Supreme Court filed its opinion (App., *infra,* 1a-18a) on September 20, 1993. Jim Pyle filed a timely petition for rehearing with the Arkansas Supreme

Court. The petition for rehearing was denied (App., *infra*, 19a) on November 1, 1993. This Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides, in relevant part:

> ". . . [N]o warrants shall issue, but upon probable cause, supported by oath or affirmation, . . ."

The first section of the Fourteenth Amendment to the United States Constitution provides, in relevant part:

> " . . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law; . . . ."

STATEMENT

This petition for a writ of certiorari is brought by Jim Pyle to review a decision of the Arkansas Supreme Court. In the decision sought to be reviewed, the Arkansas Supreme Court refused to suppress a search warrant that was obtained by a structured affidavit that contained false and misleading facts, as well as omitted material facts that vitiated probable cause, all in violation of this court's standard set forth in *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978) and *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed. 677 (1984).

Jim Pyle's home was searched on June 1, 1990, pursuant to a search warrant alleging Jim Pyle was the "source" of cocaine sold by Robert "Puck" Atkerson to officers. Drugs, drug paraphernalia and money were found in common areas of the house that Jim Pyle shared with others, including Atkerson. Jim Pyle was arrested and charged by the State of Arkansas with possession and delivery of a controlled substance and possession of drug parapher-

nalia. Jim Pyle moved to suppress the evidence seized pursuant to the search warrant and asserted the warrant was obtained by false and misleading statements as well as material omissions. Jim Pyle further argued that if the true facts had been made known to the magistrate, probable cause would not have been found and the warrant would not have issued. The trial court refused to invalidate the warrant. Jim Pyle was tried before a jury and found guilty of two counts of delivery of cocaine, possession of cocaine with intent to deliver, possession of drug paraphernalia, and misdemeanor possession of marijuana and was sentenced to eighty (80) years in prison and fined $85,000.

Jim Pyle appealed his conviction to the Arkansas Supreme Court, asserting, *inter alia*, his conviction should be reversed because the search warrant was obtained by false and misleading information, the court allowed improper "rebuttal" evidence of other bad acts following Jim Pyle's denial of involvement in the alleged acts, and the court allowed the prosecution to introduce as evidence $4,000.00 cash money that was not shown to be connected in any way to any illegal activity to be considered as proof that Jim Pyle was engaged in selling drugs. The Arkansas Supreme Court rejected Jim Pyle's arguments and affirmed his conviction on all charges. Jim Pyle asserts he is innocent of the charges and his conviction was obtained in violation of his constitutional rights. Jim Pyle seeks a petition for a writ of certiorari to review the decision of the Arkansas Supreme Court.

The questions presented herein are important issues, not only to Jim Pyle, but to virtually every citizen that is facing criminal prosecution.

A. Facts Leading Up To The Application For Search Warrant

In May 1990, Jim Pyle lived at 803 Lawrence Drive, Jonesboro, Arkansas, located at the end of a dead end street. Robert "Puck" Atkerson, a friend of Jim Pyle's worked for John P. (J. P.) Welch doing repair work on Pyle's home.

An undercover investigation was being pursued in Jonesboro by the local drug task force. The principal undercover officers were Donna Bogard, officer Thomas, officer Grisby and officer Alf. The undercover officers focused on Jim Pyle as a subject of their investigation and enlisted the cooperation of a confidential informant (hereafter "CI"). Prior to May 24, 1990, the CI placed several telephone calls to Jim Pyle. These telephone calls were overheard by the officers and were also recorded. The CI asked Jim Pyle if he would sell him cocaine which Jim Pyle flatly refused. The officers erased these and other exculpatory tape recordings and these events were not disclosed to the magistrate.

Atkerson, both a seller and user of cocaine, had also become a subject of the undercover investigation. Undercover officer Donna Bogard and the CI made contact with Atkerson, and met with Atkerson on May 24, 1990, and arranged the purchase of ⅛ oz. of cocaine. The meeting took place several blocks from Jim Pyle's home. A quantity and price was agreed upon. Atkerson then indicated he did not have the cocaine with him and would have to go to his source to get it but would return in a matter of minutes with the cocaine. Officer Bogard gave Atkerson the money for the drugs but also inquired of the identify of Atkerson's source. Atkerson refused to identify his source. The CI then suggested, "We'll just say J.P." (Although Jim Pyle's initials are J.P. he was never known as "J.P."; Atkerson's employer was John P. Welch and was sometimes referred to as "J.P.") Atkerson's reply was, "That'll work. The Boss. Sometimes I call him

Bruce." Atkerson then left and turned on Lawrence Drive and appeared to turn into Jim Pyle's driveway. Neither officer Bogard nor the CI observed whether Atkerson actually entered Jim Pyle's home. Atkerson returned approximately 20 minutes later with the cocaine. No attempt was made to obtain a search warrant at that time.

The undercover investigation continued. On May 30 and 31, 1990, the CI placed several calls to Jim Pyle's residence purporting to locate Atkerson. These phone calls were recorded. The CI's discussions were suggestive of a drug deal to which Jim Pyle refused to participate and further discouraged the CI from coming to his home.

At approximately 5:10 p.m. on May 31, 1990, Atkerson again met with Bogard and the CI. A sale of ½ oz. of cocaine was completed. Once Atkerson received the money, he stated he needed to return the money to his source. The buy money was marked. Atkerson left with the money and went to the residence of Jim Pyle. Two other officers, Thomas and Grisby, had Jim Pyle's house under surveillance, although they had not seen Atkerson at the house earlier. The officers observed Atkerson park his car in Jim Pyle's driveway, and before he went into the house, Atkerson stopped and talked to an unidentified man. Officer Thomas took a picture of Atkerson talking to the unidentified man. The man depicted in the photograph talking to Atkerson has still not been identified. Atkerson then entered the home of Jim Pyle.

B. Affidavit, Probable Cause Hearing And Execution Of Warrant

Following the drug deal on May 31, and armed with the information stated above, officer Thomas made application for a warrant to search Jim Pyle's home. Officer Thomas' affidavit stated that Atkerson had sold drugs to officer Bogard and the CI on May 24 and 31, and on both occasions Atkerson identified his source as "J.P."; that the CI knew "J.P." was Jim Pyle; that on May 24

officer Bogard was able to determine that Atkerson went to Pyle's home to obtain the drugs; and that on May 31, officer Thomas observed Atkerson arrive at Pyle's home and while outside the house, speak to a "person known to be Jim Pyle." (At the suppression hearing Thomas admitted that this was not true.) Further, at the probable cause hearing Officer Bogard stated that Atkerson had referred to his source as "J.P.", and Officer Thomas testified that on the 24th Atkerson said he was going to "J.P.'s" house and on the 31st said Atkerson told Bogard he had to take the drug money back to "J.P."

On June 1, 1990, based upon the affidavit of Officer Thomas, and oral testimony of Officer Bogard and Thomas, the magistrate issued a warrant to search the home of Jim Pyle. The search of Jim Pyle's home yielded a small quantity of cocaine, drug paraphernalia, $4,000 in cash, and $900 in marked money. The sale price was $1,100. (Atkerson testified the $900 was paid by him to Pyle for a debt owed.)

C. Suppression Hearing-How The Federal Question Was Presented

Appellant moved to suppress the evidence seized pursuant to the search on the grounds that the affidavit and testimony contained admittedly false and materially misleading information and significant omissions, resulting in an invalid warrant pursuant to *Franks v. Delaware,* 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). (The suppression hearing can be found in the record at R. 56-268; See also App., *infra,* 3a)

At the suppression hearing the following facts were admitted by the officers:

1. Officer Thomas admitted the person he observed Atkerson talking to on May 31, immediately after the drug sale, was not Jim Pyle, although he swore in his affidavit that it was Jim Pyle.

2. Officer Thomas admitted he still did not know the identity of the man Atkerson talked with outside Jim Pyle's home on May 31, although in his affidavit he swore the man was Jim Pyle.

3. Officer Thomas admitted that Atkerson on May 31 said he had to take the money back to his source but he did *not* name his source. Officer Thomas swore in his affidavit that Atkerson did name his source as "J.P."

4. There is no testimony where the CI informs any officer that "J.P." is otherwise known as Jim Pyle. There was no evidence that Jim Pyle has ever been known as "J.P." John P. Welch, Atkerson's employer is known as "J.P."

5. Officer Thomas admitted that Atkerson refused to identify his source and that the CI was the one to suggest use of the name "J.P." However, the officer swore to the magistrate that Atkerson named his source as "J.P."

6. Officers admitted that Jim Pyle had never been known as "Bruce." Atkerson, although he refused to identify his source, said he sometimes calls him "Bruce."

7. The officers admitted they had no basis for believing any contraband would be found in Jim Pyle's home at the time of the execution of the warrant.

8. The officers admitted they had no basis for believing the statements of the seller, Atkerson, were trustworthy.

9. Officer Bogard admitted that on May 24 when Atkerson left to pick up the drugs, she was only able to determine that Atkerson drove up Lawrence Street not that he actually went into Jim Pyle's house. She swore, however, to the magistrate that he did so.

In addition to the admitted false statements that were presented to the magistrate, there were also other facts known by the officers at the time the warrant was sought that were not disclosed to the magistrate. The following is a partial list of material omissions.

1. On two occasions Atkerson identified his source as "Bruce." (R. 117-119).

2. Appellant, Jim Pyle, on recorded telephone conversations refused to sell drugs to the CI, and these exculpatory tapes were erased by the police and the incidents not disclosed to the magistrate (R. 151, 238, 239).

3. Surveillance of appellant's house on May 31, 1990, did not observe Atkerson come to Pyle's house before he sold the cocaine to the informant and Officer Bogard (R. 140-142).

4. Atkerson stated that there were other people present where he allgedly went to get the drugs on May 24, 1990 (R. 136).

5. The tape recorded conversations involving Pyle were out of sequence on the tape recordings (R. 100, 238, 239).

6. The magistrate was not advised that during the "surveillance" of Atkerson during the first transaction when he allegedly obtained the cocaine from Jim Pyle, that he was out of the view of the undercover officer and the CI while they were parked at a store for approximately 10 minutes (R. 183).

7. The magistrate was not informed that the officers had no basis to believe that the statements made by Atkerson on the undercover tapes were in any manner trustworthy (R. 138, 207, 208).

8. The magistrate was not advised that the CI had called Pyle's house and left a phone number for Pyle to return his call and Pyle did not do so. The magistrate was not informed that Pyle, the alleged

dealer, did not return the phone call of the alleged buyer, the CI, or that that call was also erased (R. 412, 901, 902).

9. The officers omitted telling the magistrate that the CI said on the body mike tape that he doesn't know if the source would even know him (R. 124, 128).

10. Although it was suggested to the magistrate that Pyle stated he had another car coming in, on none of the telephone conversations made of Jim Pyle is there any mention by Jim Pyle that he has another car coming in (R. 147, 148).

11. Officer Thomas did not tell the judge that in previous phone calls with Jim Pyle that there was no mention of any drug transaction (R. 151).

The trial court held that although there were several "facts" that were incorrect, he did not believe the officers intended to misrepresent the facts, thus the court upheld the warrant and refused to suppress the evidence.

TRIAL

This case proceeded to trial by jury. The state was allowed to introduce as evidence against Jim Pyle all of the drugs, paraphernalia and money that had been seized. In addition to the suppression argument, Jim Pyle also asserted the $4,000.00 cash money was irrelevant to this case. The cash money was found under Jim Pyle's mattress and was not in close proximity of any of the drugs or paraphernalia seized nor was there any other evidence that connected the cash money to the alleged criminal activity. The $4,000 cash money was received as evidence.

Jim Pyle testified in his own defense. He flatly denied knowledge of drugs being in his house or that he had ever sold drugs. (App., *infra,* 12a; Record 1014-1015). He further testified the cash money in his bedroom was from a recent sale of an automobile. This testimony was supported by other witnesses. After Jim Pyle had rested his defense on an absolute denial of participation in the

charged crime, the trial court permitted the State, in rebuttal, to offer the testimony of a third party that in 1990 he had traded auto parts to Jim Pyle in return for cocaine and in the past had used cocaine with Pyle. The jury found Jim Pyle guilty and he was sentenced to 80 years in the Arkansas Department of Correction and finded $85,000.

On appeal the Arkansas Supreme Court, regarding the search warrant, applied the standard set forth in *Franks* and held the factual misstatements and omissions did not rise to the level of a knowing or reckless falsehood. Concerning the $4,000 cash, the Arkansas Supreme Court held the cash was relevant evidence of intent. Finally, regarding the prior bad acts, the courts held that since Pyle's defense was lack of knowledge, evidence of prior bad acts is proper rebuttal evidence to establish knowledge pursuant to Ark. R. Evid. 404(b). (The relevant portion of the Arkansas rule is identical to the Federal rule of evidence.)

REASONS FOR GRANTING THE PETITION

This petition presents three important criminal evidence and procedure questions for review that are questions that are faced by virtually every person that stands accused of a crime in this country. A clear declaration by this court on these three issues will provide guidance to all state and federal courts, as well as the prosecutors and criminal defense attorneys, and prevent a miscarriage of justice in the numerous cases that will never have the opportunity to make there way to this court for relief. The first question is an opportunity to expand and clarify the standard set forth in *Franks v. Delaware* to clearly state that a police officer has an obligation to disclose to the magistrate materials facts that would vitiate probable cause, particularly in light of the other misrepresented facts. The second question relates to the admission of other bad acts following a defendant's denial

of involvement in the alleged criminal activity. There is a strong division in the state and federal courts of appeal on this issue. Finally, the petition raises the question of whether the mere possession of this country's legal tender, United States Dollars, can be admitted as evidence of illegal activity when the money is not shown to be connected with any alleged illegal activity. The lower court decision in upholding this search warrant, allowing prior bad acts and allowing legal tender unconnected to criminal activity to be proof of criminal conduct is erroneous. The issues presented are important. The guiding voice of this court is needed to address these issues.

I. WHETHER A POLICE OFFICER'S AFFIDAVIT TO OBTAIN A SEARCH WARRANT, STRUCTURED IN SUCH A WAY AS TO OMIT MATERIAL FACTS THAT WOULD VITIATE PROBABLE CAUSE, ALONG WITH MATERIAL, KNOWING AND RECKLESS FALSE STATEMENTS, VIOLATED THE STANDARD SET FORTH IN *FRANKS v. DELAWARE* AND *UNITED STATES v. LEON*, AND REQUIRES SUPPRESSION OF THE EVIDENCE SEIZED PURSUANT TO THE WARRANT.

In Franks this court invalidated Delaware's absolute bar to a challenge of the veracity of the sworn statement used by the police officer to obtain a warrant and held that a criminal defendant must be afforded the opportunity to challenge the factual basis upon which a warrant was issued. In order to establish the warrant was obtained by false pretenses, the court in *Franks*, 468 U.S. at 918, stated:

> There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn otherwise reliable state-

> ments of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient.

Since the lower court in *Franks* did not allow the defendant to fully develop the false statements below, *Franks* was remanded to the lower court to consider the facts. This case presents the court with something it did not have when it decided *Franks*—a clear record that documents the false statements made to the magistrate. Further, the record below establishes that the officers had in their possession information that negated probable cause and they omitted this information from the affidavit and did not inform the magistrate of its existence.

In *Leon,* this court established the "good faith" doctrine to an otherwise illegal search. *Leon* does not affect the issue presented. In fact, *Leon,* 468 U.S. at 923 specifically recognized that suppression is warranted when the police officers obtain a warrant by false and misleading information:

> Suppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth. *Franks v. Delaware* (citations omitted).

A. *Franks* Should Be Extended To Include Omissions

Misrepresentation to the magistrate can occur by false statement or reckless disregard for the truth. Although not specifically stated, this standard must include material information that is omitted by the police officer. Whether the officer misrepresents a key fact or withholds a key fact that would negate probable cause, the result is the same—the magistrate is deceived by a false and structured affidavit. ". . . [T]he exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates." *United States v. Leon,* 468 U.S.

697, 104 S. Ct. 3405 (1984). The need for this extension of *Franks* has been recognized by some of the circuit courts. *U.S. v. Reivich,* 793 F.2d 957 (8th Cir. 1986); *U.S. v. Jacobs,* 986 F2d 123 (8th Cir 1993).

B. The Decision Of The Arkansas Supreme Court Is Erroneous

In the present case, the record contains numerous instances of false swearing, misrepresentation and omissions that were perpetrated in the pursuit of a search warrant in this case. The police, for whatever reason, had determined that Jim Pyle was a suspect before the sales took place and had even staked out his home on surveillance. When it came time to seek a search warrant, the police officers structured the testimony so as to present the evidence in such a light to make it favorable to the magistrate to issue a warrant.

Contrary to the decision of the Arkansas Supreme Court, there has been a factual showing in this case of false swearing by the officers and a clear structuring of the affidavit, through misrepresentations and omissions, to suggest probable cause where it did not exist. For example, it can hardly be termed "innocent" for officer Thomas to state that he knew Atkerson and he knew Pyle and that following the May 31, drug deal, the two met in the driveway and he took a photograph of them. This was absolutely not true and Thomas was forced to admit that this was false testimony (R. 84-90). The identity of the man is still unknown. Could this be an innocent error-mere negligence. These officers had staked out Jim Pyle's home for weeks and made numerous attempts to entrap him to no avail. To suggest that the officers did not actually know what Jim Pyle looked like is absurd in light of the time they had him under investigation. Even if they did not know what he looked like, to represent to the magistrate that the officer knows the man in the photograph to be Jim Pyle is at a minimum reckless disregard for the truth!

As a further example of false swearing, Officer Thomas stated that Atkerson named his source as "J.P." when in fact Atkerson refused to name his source. The confidential informant suggested a name for the source, Atkerson merely said "That'll work." Atkerson would have agreed with any designation. Significantly, Atkerson also called his source "The Boss" which was reported to the magistrate. The officers failed to inform the magistrate that Jim Pyle was not known as "J.P." but Atkerson's boss was known as "J.P." In the same sentence, however, Atkerson also referred to his source as "Bruce" which was not reported to the magistrate since the warrant they were seeking was for an individual by the name of Jim, not Bruce.

Moreover, in this particular case, there was no evidence showing that the CI was reliable and further there was an admission by the officers that Atkerson was not trustworthy. There was no observation of any drugs in Jim Pyle's home nor in his possession. There were no conversations where Pyle agreed to sell or deliver drugs, but to the contrary, Pyle expressly refused to partircipate in a drug sale with the CI. Moreover, the police erased the exculpatory tape recording and did not apprise the magistrate as to Jim Pyle's refusal to participate in a drug deal. A common sense, practical evaluation of the effort to obtain the search warrant in this case leads to the conclusion that this is police conduct that cannot be tolerated and is precisely the police conduct sought to be prevented by *Franks* and not protected by the "good faith exception" of *Leon*.

When considering all of the false statements and material misrepresentations and omissions, the line must be drawn and this search must be suppressed. When police misconduct rises to a level which circumvents the role of a neutral and detached magistrate, by providing that magistrate a partially fabricated and clearly distorted view of the facts, that must result in suppression.

As far back as *Elkins v. United States*, 364 U.S. 206, 80 S. Ct. 1437 (1960), the Court, in speaking of the exclusionary rule, stated:

> . . . The rule is calculated to prevent, not to repair. It's purpose is to deter—to compel respect for the constitutional guarantee in the only effectively available way—by removing the incentive to disregard it.

If the abuse of police officers is tolerated by excuses and justifications of extrapolated logic, the principles of *Franks* become effectively meaningless. If this search is not invalidated, *Franks* becomes merely a hollow theory of law without practical application and merely a "sea of words void of a fish of meaning."

II. WHETHER THIS COURT SHOULD TAKE THIS CASE TO RESOLVE THE SPLIT IN THE FEDERAL CIRCUIT COURTS OF APPEAL AND STATE COURTS AS TO WHETHER A DEFENDANT THAT TAKES THE WITNESS STAND IN HIS OWN DEFENSE AND ABSOLUTELY DENIES ANY PARTICIPATION IN THE CHARGED CRIME CAN BE CONFRONTED BY THE STATE IN REBUTTAL WITH PROOF OF OTHER UNRELATED BAD ACTS FOR THE PURPOSE OF SHOWING KNOWLEDGE OR INTENT TO COMMIT THE CRIME CHARGED

At trial, Petitioner, Jim Pyle took the stand in his own defense. Pyle flatly denied knowledge of drugs being in his home or that he had ever sold drugs. (App., *infra*, 14-15; Record 1014-1015). After Pyle had rested on an absolute denial of participation in the charged crime, the State, in rebuttal, offered the testimony of a third party that in 1990 he had traded auto parts to Pyle in return for cocaine and in the past had used cocaine with Pyle. (Record 1029-1032).

The Arkansas Supreme Court held that since Pyle's defense was lack of knowledge, evidence of prior bad acts is proper rebuttal evidence to establish knowledge pursuant to Ark. R. Evid. 404(b). (App. 12a). (The

relevant portion of the Arkansas rule is identical to the Federal rule of evidence.) The ruling is incorrect because intent is not placed in issue by a defense that the defendant did not commit the charged act. *United States v. Ortix*, 857 F.2d 900 (2d Cir. 1988), *cert. denied*, 189 U.S. 1070 (1989); *United States v. Silva*, 580 F.2d 144 (5th Cir. 1978). The ruling of the Arkansas Supreme Court has the effect of subjecting every criminal defendant in Arkansas to improper rebuttal testimony if he takes the stand in his own defense and denies the charged crime. Moreover, there is a deeply divided split of authority in the federal circuit courts of appeal on the question presented. This issue needs the guiding hand of this court to squarely address the question presented for both the state and federal courts.

A. This Question Presented Is Important

Our system of justice is hinged on the concept that a criminal defendant should go free unless the government can prove his guilt beyond a reasonable doubt. It goes without saying this determination of guilt should be based on evidence of the alleged crime not on whether the defendant has committed other "wrong" acts in the past. If a rule or decision allows the introduction of improper and prejudicial evidence to be considered by the jury in it's deliberation, the defendant is deprived of due process of law.

The question presented effects more than one defendant from a small town in Arkansas. This question affects defendants across the United States, in state and federal court, that chose to take the stand in their own defense and deny they committed the alleged crime. In Arkansas, as well as several other federal circuits, once the defendant denies involvement in the alleged act the government is then entitled to dredge up prior bad acts as "rebuttal" evidence, under the guise of establishing "knowledge or intent", for the jury to consider as evidence that the defendant must have committed the charged crime. Such evidence does nothing more than tell the jury that the

defendant is a bad person that should be punished regardless of whether he committed the charged crime. If this rebuttal evidence is improper in the face of a flat denial of the charged criminal act, then numerous criminal defendants have been (and still are) facing conviction on evidence that the jury should never have heard. The Arkansas Supreme Court relied upon Ark. R. Evid. 404(b) as support for the admissibility of this rebuttal evidence. However, the question presented does not involve a mere claim a misinterpretation of the State's own rule of evidence. The importance of the question goes far beyond that. The relevant portion of Ark. R. Evid. 404(b) reads:

> Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identify, or absence of mistake or accident.

The relevant portions of Fed. R. Evid. 404(b) are identical. (However, in 1991 the Federal Rule was amended to include a pretrial notice requirement in criminal cases which has no application to the issue presented.) This language quoted above is model language that is found in virtually every state's rules of evidence. For this reason, a decision by this court regarding the proper application of this rule will provide direction to the state and federal courts on this important evidentiary and constitutional issue.

B. A Split Of Authority Exists In The Circuit Courts Of Appeal

The need for a decision by this court is demonstrated by the split in the Federal Circuit Courts of Appeals regarding the admissibility of rebuttal evidence of prior crime to establish intent or knowledge under Rule 404(b)

when a defendant rests his defense on an absolute denial of participation in the charged crime. For example, in *United States v. Jenkins,* 7 F.3d 803 (8th Cir. 1993), the Eighth Circuit Court of Appeals held that proof of prior drug transactions is inadmissible as rebuttal evidence following a Defendant's denial of any involvement in the charged act. Jenkins was charged with selling LSD on two occasions. Jenkins denied the charged acts. On rebuttal, the government was allowed to offer the testimony that Jenkins had sold drugs on other occasions. In reversing the lower court, the Eighth Circuit stated:

> Because Jenkins testified unequivocally that he did not commit the acts charged against him, the rebuttal testimony clearly brought Defendant's prior bad character to the forefront to infer that having sold drugs on three prior occasions, he undoubtedly sold drugs on the two occasions charged in the indictment.

The Eighth Circuit embraced the well-established rule of the Second Circuit Court of Appeals that there is no issue of intent where the defendant denies he committed the charged act. *United States v. Ortiz,* 857 F.2d 900 (2d Cir. 1988), *cert. denied,* 489 U.S. 1070 (1989); *see also, United States v. Colon,* 880 F.2d 650 (2d Cir. 1989). This rule has also been followed in the Ninth Circuit, *United States v. Palmer,* 990 F.2d 490 (9th Cir. 1993) and the Fifth Circuit, *United States v. Silva,* 580 F.2d 144 (5th Cir. 1978).

Other Circuits have taken a contrary or modified view finding that the evidence was admissible in full or in some limited capacity. See *United States v. Mazzanti,* 888 F.2d 1165 (7th Cir. 1989), *cert. denied,* 495 U.S. 930 (1990), *United States v. Hernandez,* 975 F.2d 1035, 1040 (4th Cir. 1992); *United States v. Russo,* 717 F.2d 545 (11th Cir. 1983).

Pyle has found no reported decisions of this Court that directly addresses the issue presented. The present

case would provide a perfect forum for the Court to draw a bright line regarding the proper scope of rebuttal evidence following a Defendant's denial of participation in the charged criminal activity. Such evidence in the present case was obviously prejudicial, and if improperly admitted, denied Defendant a fair trial. Because of the serious due process issue this question presents, as well as the split of authority among the Circuit Courts of Appeals, this Court should grant this petition and provide the State and federal courts with direction on this issue.

III. WHETHER THE MERE EXISTENCE OF CASH MONEY SEIZED AT JIM PYLE'S RESIDENCE, NOT CONNECTED BY ANY EVIDENCE TO ANY DRUG TRANSACTION, IS RELEVANT FOR THE JURY TO CONSIDER AS EVIDENCE OF DEFENDANT'S INTENT TO DISTRIBUTE A CONTROLLED SUBSTANCE, I.E., IS CASH MONEY, IN AND OF ITSELF, WITHOUT MORE, EVIDENCE OF CRIMINAL CONDUCT

The court received into evidence $4,000, in cash, seized during the search that was found wrapped in aluminum foil under the mattress in Jim Pyle's bedroom. There was no evidence relating the money to any criminal activity. In fact, the evidence was to the contrary. Jim Pyle testified that he bought and sold vehicles for cash. Susan Davis testified that approximately two weeks prior to the arrest of the defendant, she had sold a vehicle to the defendant and he had paid her in cash, and the remaining stack of cash that he had was approximately the same amount as that he had paid her. Pyle paid her $6,000 for the vehicle and had $4,000 left which was put under the mattress.

Jim Pyle acknowledges that numerous courts have allowed the introduction of *unexplained* cash as evidence. *U.S. v. Newton,* 891 F.2d 944 (1st Cir. 1989); *U.S. v. Tramunto,* 513 F.2d 1087 (2d Cir); *U.S. v. LaGuardia,* 774 F.2d 317 (8th Cir. 1985); *U.S. v. Brett,* 872 F.2d

1365 (8th Cir. 1989); *U.S. v. Thompson,* 925 F.2d 234 (8th Cir. 1991); *U.S. v. Gibbs,* 904 F.2d 52 (D.C. Cir. 1990).

The mere fact that Jim Pyle possessed cash money, this country's legal tender, in his residence that was not shown in any way to be connected to the alleged illegal activity should not be used as proof of illegal activity. None of the $4,000 contained in the package found in the bedroom contained any marked money used in a drug buy, nor did it have cocaine residue on it or any other evidence relating it to the charge pending against the defendant. The money was merely a basis for speculation that perhaps the money was drug money.

Petitioner asserts this Court should accept this case and establish a new rule regarding the use of cash money as evidence of illegal activity. First, before the evidence is admitted at trial, the government should be required to make a preliminary showing outside the presence of the jury that the money is connected with illegal activity. If the government cannot make a prima facie case connecting the money to illegal activity, the evidence should not be received. If the government is able to make a prima facie case, the burden should then shift to the defendant to satisfactorily explain the presence of the money. The establishment of this procedure will provide a defendant with the opportunity to prevent unwarranted and prejudicial testimony from being presented to the jury.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BOBBY MCDANIEL
MCDANIEL & WELLS, P.A.
400 South Main Street
Jonesboro, Arkansas 72401
(501) 933-5950
Counsel for Petitioner